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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Petitioner,

v.

RICHMOND, FREDERICKSBURG AND POTOMAC
RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT BEFORE JUDGMENT

JOHN O'B. CLARKE, JR.
(Counsel of Record)
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

LOUIS P. MALONE, III
General Counsel
Brotherhood of Maintenance
of Way Employes
400 First Street, N.W.
Washington, D.C. 20001
(202) 638-2135

Attorneys for Petitioner
Brotherhood of Maintenance
of Way Employes

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QUESTIONS PRESENTED

1. Does Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, withdraw jurisdiction from the federal courts to enjoin a rail union engaged in a lawful strike from peacefully picketing a railroad which is neutral to the dispute?

2. Do the Railway Labor Act (45 U.S.C. § 151, *et seq.*) and Section 20 of the Clayton Anti-Trust Act (29 U.S.C. § 52), as reasserted by the Norris-LaGuardia Act, immunize peaceful secondary picketing by a rail labor organization from "being a violation of any law of the United States."

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT BEFORE JUDGMENT

Petitioner Brotherhood of Maintenance of Way Employes [hereinafter, "BMWE"] respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review before judgment by that court the appeal by the Richmond, Fredericksburg and Potomac Railroad Company [hereinafter, "RF&P"] in 4th Cir. No. 86-3544 from orders of the United States District Court for the Eastern District of Virginia denying two separate requests by respondent RF&P for preliminary injunctions to restrain petitioner BMWE from picketing RF&P facilities in aid of the BMWE's strike against the Maine Central Railroad and the Portland Terminal Company [hereinafter, "MEC" and "PT," respectively].

OPINIONS BELOW

Since this is a request for a writ of certiorari before judgment, there is no opinion or order of the Fourth Circuit finally disposing of this case. However, United States Circuit Judge H. Emory Widener, Jr., issued an order on April 12, 1986, as a single Circuit Judge granting respondent RF&P's emergency motion for an injunction pending appeal. That order has been reproduced herein as Appendix E and is presently the subject of a motion by petitioner to reconsider. The District Court issued two orders on April 4 and April 10, 1986, respectively, denying separate requests by respondent to issue preliminary injunctions. Those orders have not been officially reported and are reproduced herein as Appendices A and C, respectively. Also, petitioner has attached hereto as Appendices B and D the oral comments which the District Court made in denying respondent's injunction requests.

JURISDICTION

This Court has jurisdiction by virtue of 28 U.S.C. § 1254(1) to review this case before judgment by the Court of Appeals upon the request of "any party" to the appeal. Respondent RF&P invoked the District Court's jurisdiction under 28 U.S.C. §§ 1331 and 1337 to consider claims arising under two Acts of Congress regulating interstate commerce—*i.e.*, the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* When the District Court denied the second request for a preliminary injunction, respondent filed a notice of appeal on April 11, 1986, to the Fourth Circuit from both orders; that appeal was taken under 28 U.S.C. § 1292(a)(1) and 29 U.S.C. § 110. This petition is timely under 28 U.S.C. § 2101(e).

STATUTES INVOLVED

This case concerns the proper interpretation to be given to Sections 4 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104 and 113, which are reproduced herein as Appendix F.

STATEMENT OF THE CASE

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides that:

> No court of the United States shall have jurisdiction to issue any restraining order or termporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating in such dispute (as these terms are herein defined [in § 13, 29 U.S.C. § 113]) from doing, whether singly or in concert, any of the following acts: [which include peaceful picketing to urge others to withhold their services from their employers] . . . .

This Court has stated over and over again that this withdrawal of jurisdiction must be construed broadly and literally. *E.g., Jacksonville Bulk Terminals, Inc. v. ILA,* 457 U.S. 702, 708 (1982); *Marine Cooks & Stewards v. Panama Steamship Co.,* 362 U.S. 365, 369 (1960); *Order of Railroad Telegraphers v. Chicago & North Western R.R.,* 362 U.S. 330, 335-36 (1960). Unfortunately, the lower federal courts have not fully accepted these teachings, for although a few judges have correctly given the Act a broad reading, numerous injunctions have been issued or permitted to stand against petitioner by district and appellate courts premised upon narrow and, petitioner submits, unwarranted readings of the Norris-LaGuardia Act and the policies underlying both that Act and the Railway Labor Act.

Those improvidently issued injunctions have prolonged the Brotherhood's strike against the MEC and PT and, while protecting the railroads which sought those injunctions, have

continued the severe impact which this strike is having upon the Northeast section of this Country.[1] Moreover, those injunctions have embroiled the federal courts into the midst of this labor dispute contrary to both the intent of Congress in enacting the Norris-LaGuardia Act and the repeated admonitions by this Court that federal courts must avoid such intrusions into labor controversies.

Since the lower federal courts have ignored the clear, literal terms of the Norris-LaGuardia Act, and have done so for varied and contradictory reasons (*compare,* Appendix E *with* Appendix G), it is crucial to petitioner and, we submit, to the rail industry that this Court accept review of this case to resolve once and for all whether the Norris-LaGuardia Act is to be applied literally and broadly to labor disputes in the rail industry.

A. The Strike Against MEC and PT

On March 3, 1986, petitioner BMWE began a strike against the PT, a wholly owned subsidiary of MEC, and then on March 4, 1986, commenced its strike against MEC. Petitioner resorted to this peaceful self-help in order to place economic pressure upon MEC and PT to convince those carriers that it was in their best interests to resolve their dispute with the Brotherhood over proposed changes to rates of pay, rules and working conditions. That self-help, however, was not undertaken until more than thirty (30) days after the National Mediation Board [hereinafter, "NMB"] had released the parties from mediation under Section 5, First of the Railway Labor Act, 45 U.S.C. § 155, First. MEC and PT responded to those strikes by locking-out their employees who were represented by the BMWE and by filing a suit against petitioner to enjoin the strikes. *MEC v. BMWE,* D.Me. Civil Action No. 86-0083-P. On March 5, 1986, the United States District Court for the District of Maine denied the carriers' request for a prelimi-

[1] The Governors of four States (*i.e.,* Maine, Massachusetts, New York and Vermont) have declared that emergency situations have been caused by this strike and have urged the appointment of an Emergency Board under Section 10 of the Railway Labor Act, 45 U.S.C. § 160. While the National Mediation Board has recommended the appointment of such a Board, the President has not acted on that recommendation.

nary injunction. Consequently, for purposes of this case, it must be presumed that petitioner BMWE has exhausted unsuccessfully the major dispute resolution procedures of the Railway Labor Act and is engaged in lawful primary self-help against MEC and PT. *Brotherhood Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 244 (1966).

MEC and PT are part of the Guilford Transportation Industries, Inc.'s rail system which also consists of several other rail carriers in the Northeast, including in particular the Boston and Maine Corporation and the Delaware & Hudson Railway Company [hereinafter, "B&M" and "D&H," respectively]. In order to place sufficient economic pressure on the Guilford system to require MEC and PT to negotiate in good faith, petitioner BMWE extended its picketing to the B&M on March 6, 1986, and to the D&H shortly thereafter. While the B&M at first sought to enjoin that picketing, it subsequently withdrew its request and has not renewed its efforts to stop that picketing. The D&H, however, filed first in a New York State court, and then filed a counterclaim with the United States District Court for the District of Maine in a suit which the Brotherhood had brought in that Court to determine the validity of its secondary picketing; the D&H then sought to enjoin that picketing. On April 2, 1986, the District Court, relying upon Section 4 of the Norris LaGuardia Act and this Court's decision in *Jacksonville Bulk Terminals, supra,* denied the D&H request for a preliminary injunction. *BMWE v. Guilford Transportation Industries, Inc.*, D.Me. No. 86-0084-P, decided April 2, 1986. The D&H has since noted an appeal from that order to the United States Court of Appeals for the First Circuit, and its appeal is presently pending.

B. Picketing Of Respondent RF&P

In order to make its picketing of the Guilford rail system as effective as possible, petitioner BMWE placed pickets at respondent RF&P's rail yard in Alexandria, Virginia—*i.e.*, the Potomac Yard. Petitioner placed pickets at that yard because the D&H operated into the Potomac Yard and obtained substantial traffic by interchange with other railroads in that yard. Affidavit of William E. LaRue at ¶ 4. Indeed, respon-

dent RF&P proffered at the second preliminary injunction hearing that approximately 450 rail cars destined for the D&H had accummulated in that yard between April 2 and April 10. Transcript of April 10, 1986 at 13.

Respondent RF&P asked the United States District Court for the Eastern District of Virginia to enjoin petitioner from picketing its facilities and from asking other rail employees to withhold their services from their rail employers in support of the BMWE's dispute with MEC and PT.[2] That request was denied by United States District Judge Albert V. Bryan, Jr. because he concluded that Section 4 of the Norris-LaGuardia Act applied and withdrew jurisdiction from the court to enjoin the picketing in this case. According to the District Court that result was mandated by the Norris-LaGuardia Act because (Appendix B at 1b-2b):

> It's broad [*i.e.*, the Norris-LaGuardia Act], but it's not overbroad. I think the definition itself is broad of a labor dispute and certainly what constitutes "growing out of a labor dispute" has been, as taught by Jacksonville Bulk Terminal [*supra*], an extremely broad concept. There is no doubt that, or it appears that they are picketing a neutral, but it's not completely disinterested in the underlying labor dispute in that it has an association and does some business with the MCRR and PTRR, which do have the underlying labor dispute and which are of the same industry.
>
> I think under this set of circumstances, the Norris-LaGuardia Act deprives this Court of jurisdiction to award the preliminary temporary restraining order sought by the plaintiff, and the request for it will be denied.

---

[2] Petitioner's picket signs read:

B.M.W.E.
On Strike Against
M.E.C. R.R.
& P.T. Co.

Transcript of April 4, 1986 at 9.

Respondent RF&P reacted to its inability to enjoin the picketing by using supervisory employees to perform the work of the contract employees who honored the Brotherhood's picket lines at the Potomac Yard. Transcript of April 10 at 10-11. Since respondent RF&P, in petitioner's opinion, was able to move its traffic, including that destined for the Guilford system, through the use of supervisors, the Brotherhood extended its picketing on April 9 to respondent's yard at the southern end of its line in Richmond, Virginia—*i.e.*, the Acca Yard.

Respondent reacted to that move by again seeking an injunction from the District Court, but on April 10, 1986, the court denied that request. Once again, the court informed respondent RF&P that Section 4 of the Norris-LaGuardia Act withdrew jurisdiction to enjoin the picketing; as the court stated orally in denying the request for a preliminary injunction (Appendix D at 2d):

> I think that the Court is required now to read the Norris-LaGuardia Act literally and broadly in its definition of arising out of a labor dispute. I think once that determination is made, the Court can go no further. It lacks jurisdiction to enter the temporary restraining order or preliminary injunction that the plaintiff [RF&P] seeks.

Respondent argued that the Brotherhood had to show that the picketing would have an economic impact on the struck carrier and that the court had to inquire into that fact before this case could be viewed as "involving or growing out of a labor dispute" within the meaning of the anti-injunction Act. Transcript of April 10, 1986 at 9. That argument was rejected by the District Court because it concluded that "what Jacksonville Bulk Terminal [*supra*] teaches is that we should read the Norris-LaGuardia Act literally and broadly and when you do that you can't inquire into economic impact." Appendix D at 2d; *see also,* Appendix C at 1c.

Once the District Court denied its second request for an interlocutory injunction, respondent RF&P noticed an appeal to the Fourth Circuit and requested from first the District Court and then from the appellate court an injunction pending

appeal. After the District Court denied its request, the railroad presented its motion for an injunction pending appeal to United States Circuit Judge H. Emory Widener, Jr., on an emergency basis on Saturday, April 12, 1986. Judge Widener heard oral argument on that motion and issued an injunction pending appeal restraining petitioner from picketing respondent's facilities. That injunction was issued because the Court, relying upon *Ashley, Drew & Northern Ry. v. United Transportation Union,* 625 F.2d 1357 (8th Cir. 1980), concluded both that Section 4 of the Norris-LaGuardia Act was inapplicable because petitioner did not have a labor dispute with respondent RF&P, and that the picketing should be enjoined because it interfered with interstate commerce. Order of April 12, 1986, Appendix E at 3e.

Petitioner BMWE's reliance upon this Court's decision in *Jacksonville Bulk Terminals, Inc. v. ILA, supra,* was rejected because that case, according to the Circuit Judge, involved a labor dispute between the employer being picketed and the picketing union. In this case, the court opined: "There is no labor dispute here between RF&P and the Brotherhood. Therefore, I think it doubtful that the Norris-LaGuardia Act forbids an injunction to issue in this case merely because the Brotherhood is in a dispute with Maine & Central [*sic*]." Appendix E at 3e. That conclusion, the court noted, "may well be contrary to" *Smith's Management Corp. v. IBEW,* 737 F.2d 788 (9th Cir. 1984). *Id.* at 4e.

Earlier in his order, Judge Widener had stated that he "[took] it as a given that [picketing which "causes a considerable interference with interstate commerce"] . . . may be enjoined." *Id.* at 2e. Petitioner had argued that even if the Norris-LaGuardia Act did not withdraw jurisdiction from the federal courts to enjoin the picketing in this case, that picketing nevertheless could not be enjoined because it was permissible under the Railway Labor Act. In making that argument, petitioner relied upon this Court's decision in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 392-93 (1969), where this Court held that peaceful "picketing—whether characterized as primary or secondary—must be deemed conduct" (394 U.S. at 393) protected by the Railway

Labor Act "so long as its use conflicts with no other obligation imposed by federal law." 394 U.S. at 392-93. That argument was rejected because Judge Widener concluded that: "[I]t seems to me that the interference with interstate commerce is a sufficient other obligation imposed by federal law that has been violated in this case; at least it appears that way to me now on the papers at hand and upon argument of counsel." Appendix E at 3e.

Petitioner BMWE asked the Fourth Circuit on April 18, 1986, to reconsider Judge Widener's ruling (*see,* Rule 27(c), Fed. R. App. P.), but the court has not ruled upon that request. Judge Widener, moreover, granted respondent RF&P's unopposed motion to expedite its appeal, and at present, this case is scheduled to be heard on its merits on May 5, 1986.

REASONS FOR GRANTING THE WRIT

I. Even Though This Court Has Repeatedly Instructed The Lower Courts To Apply The Norris-LaGuardia Act Literally And Broadly, Petitioner BMWE's Efforts To Exert Pressure Upon MEC and PT By Picketing Neutral Railroads Have Been Blocked By Most Federal Courts Which Have Disregarded This Court's Directions And Have Concluded That The Norris-LaGuardia Act Must Be Read Narrowly In A Case Involving Or Growing Out Of A Labor Dispute Subject To The Railway Labor Act

For more than seventy years Congress has declared that federal courts should not be used as strike-breaking tools and, to accomplish that objective, Congress has provided since 1914 that peaceful picketing arising out of a labor dispute must not be enjoined by federal courts unless that picketing conflicts with specific federal legislation or paramount congressional policy dealing with labor matters. Section 20, Clayton Anti-Trust Act, 38 Stat. 730, 738 (1914), 29 U.S.C. § 52; *Jacksonville Bulk Terminals, Inc. v. ILA,* 457 U.S. 702, 708 (1982). While this Court has enforced that command since 1932, the instant case, and the other cases which have arisen during the past few weeks from petitioner's efforts to engage in secondary picketing,

show that the lower federal courts have not accepted fully Congress' instruction that federal courts not become embroiled in labor disputes. Those admonitions have been ignored and many lower federal courts have entered into the midst of this labor dispute by examining the motives for the union's conduct and by enjoining peaceful picketing because that picketing offends the individual judge's views of social and economic policy.

Because the lower federal courts, with but a few exceptions, have ignored both the commands of the Norris-LaGuardia Act and the consistent rulings of this Court that this legislation be applied broadly, and have effectively exempted secondary picketing of a railroad from the conduct immunized by Section 4 of that Act, the anti-injunction Act has, in effect, been repealed by judicial fiat in Railway Labor Act cases. Petitioner BMWE respectfully submits that it is crucial to the balance of economic power between rail labor and the railroads established by the Congress through the Railway Labor Act, that this Court examine the validity of the lower courts' actions and inform petitioner, our nations railroads, and the federal courts about the manner in which the Norris-LaGuardia Act is to be applied in a case growing out of a rail labor dispute.

This Court has previously noted on several occasions that Congress enacted the Norris-LaGuardia Act "in response to Federal-court intervention on behalf of employers through the use of injunctive powers against unions and other associations of employees." *Jacksonville Bulk Terminals, supra,* 457 U.S. at 715. That intervention had caused the judiciary to fall into disrespect among a large segment of the public because employees frequently perceived the federal courts, which often issued their injunctions on solely the judge's individual views of social and economic policy, as being biased in favor of the employers; in short, employees viewed the courts as being simply strike-breaking tools. *Id.* at 715-16. Railroad strikes were not excepted from this concern and, indeed, the injunction which enjoined the 1922 railroad shopmen's strike was cited as a primary example of the urgent need for the anti-injunction legislation. *See,* F. Frankfurter & N. Greene, THE LABOR INJUNCTION at 62-63 (MacMillan Co. 1930).

To correct the abuses of the past and "to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, . . . Congress [when it enacted the Norris-LaGuardia Act] cut through all the tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure" *United States v. Hutcheson,* 312 U.S. 219, 236-37 (1941). Besides eliminating the need for any subjective inquiry, Section 4 of the Norris-LaGuardia Act went further and expressly provided that federal courts shall not have jurisdiction to enjoin, either temporarily or permanently, "any person or persons participating or interested" in any labor dispute from performing any of the concretely enumerated acts, including peacefully picketing (*see,* Section 4(a), (e) and (i)) "in any case involving or growing out of any labor dispute . . . ." 29 U.S.C. §104. Section 13 of that Act defined the crucial terms used in Section 4's peremptory language, and as relevant here, provided in Section 13(a) that: "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry . . . ." 29 U.S.C. §113(a). Moreover, the term "labor dispute" as used in that Act, according to Section 13(c), "includes any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. §113(c).

When the plain language of Sections 4 and 13 of the Norris-LaGuardia Act is applied to this case, it is obvious that the dispute between petitioner BMWE and the MEC and PT is a "labor dispute" because it involves a controversy over the terms and conditions of employment. Moreover, it is also obvious that when the terms "involving or growing out of a labor dispute" are given their ordinary meaning, the picketing of respondent RF&P "involves or grows out of the labor dispute" between petitioner and the MEC/PT. Indeed, petitioner BMWE has no other reason to expend the time and effort or to incur the economic suffering for rail employees which such picketing entails, except in aid of its labor dispute with MEC and PT; moreover, respondent RF&P has not alleged that another reason exists. Consequently, if the literal terms of the

Norris-LaGuardia Act are given their plain meaning, the picketing in this case falls within the concretely enumerated types of union conduct immunized from injunctions by Section 4 of that Act.

While the District Court gave the Norris-LaGuardia its literal meaning in this case, the Circuit Judge who heard the railroad's request for an injunction pending appeal, and most of the other federal courts which have addressed this issue in the past few weeks, have refused to apply Section 4 and 13 broadly to rail labor disputes. Those lower courts have refused to give the Act its broad, literal reading because they concluded that when applied literally, Sections 4 and 13 would authorize petitioner to picket without fear of an injunction "any railway installation anywhere in the United States on account of a dispute which, in its broadest terms, is in Maine, New Hampshire and Vermont." Appendix E at 4e. To limit the broad, literal terms of Section 4 and 13(a) of the Act, the courts have read into the Act an exception to its literal terms for railway labor act disputes that requires the "labor dispute" over which the picketing occurs to be between the union and the picketed carrier, or at least between the union and a carrier with which the picketed carrier is "substantially aligned." [3] *See, Ashley, Drew & Northern Ry. v. United Transportation Union*, 625 F.2d 1357, 1363-64 (8th Cir. 1980).

In *Ashley Drew*, the Eighth Circuit explained its approach to the Norris-LaGuardia Act as follows:

> Most courts considering the scope of section 13(a) . . . have not relied on a literal reading. Instead, these courts have come to results in accord

[3] In labor parlance, this means that the activity is no longer "secondary." Under the National Labor Relations Act, a third-party employer who "substantially aligns" himself with the primary employer in a labor dispute loses his protected neutral status and becomes a primary employer. A union striking the primary employer is then free to picket the ally, or take whatever other action against the ally as could be taken against the primary. A classic explanation of this principle, known as the ally doctrine, is set forth in *NLRB v. Electrical Workers*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956). In such a case, secondary activity is not involved for the allied employer is no longer considered a neutral to the dispute.

> with the following test: when a non-struck employer seeks to have a union's activities enjoined by a federal court the case involves or grows out of a labor dispute—and thus the Norris-LaGuardia anti-injunction provisions apply—only when the offending activity is furthering the union's economic interest in a labor dispute.

625 F.2d at 1363. Although the Act does not contain any specific standards which can be used to define the parameters of the "economic interest" test, the Eighth Circuit looked to the Fifth Circuit's decision in *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 362 F. 2d 649 (5th Cir.), *aff'd by an equally divided Court*, 385 U.S. 20 (1965), and concluded that:

> Under this "economic self-interest test," the subject matter of the present case—the picketing of [a second carrier] . . .—would involve or arise out of the [primary] . . . labor dispute if [the second carrier] . . . were "substantially aligned" with [the primary carrier] . . . .

625 F.2d at 1364. This result was, in the *Ashley Drew* Court's opinion, consistent with the Act, for according to the court (625 F.2d at 1366):

> [I]t is reasonable to conclude that section 13(a) was meant to preclude injunctive interference with bargaining or organizing on an industry-wide or craft-wide basis. It was not meant to extend an anti-injunctive shield for union activities beyond the place where the union's interest in a labor dispute cease.

Although the *Ashley Drew* "substantial alignment" test is far more restrictive than the Fifth Circuit's "economic self-interest" test (*compare, Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R., supra,* 362 F.2d at 654-55, *with, Ashley Drew, supra*, 625 F.2d at 1363-64), both tests, as shown by the recent federal court decisions arising from petitioner's strike, conflict with the plain language of the Norris-LaGuardia Act, Congress' intent in enacting that legislation, and this Court's interpretation of the scope of that Act.

A. The Lower Courts' Restrictive Reading Of The Norris-LaGuardia Act Conflicts With Congress' Intent, This Court's Decisions And A Decision By The Ninth Circuit

Congress, as this Court has explained before, enacted the Norris-LaGuardia Act in part to overrule the restrictive interpretations which this Court and other federal courts have given to Section 20 of the Clayton Act which had limited that Act's labor provisions to disputes between an employer and its employees only. *Jacksonville Bulk Terminals, Inc. v. ILA, supra,* 457 U.S. at 715-16. To overrule those restrictive interpretations, Congress used language which drew no distinction between primary and secondary activity by a labor organization (*e.g., National Woodwork Manufacturers Assoc. v. NLRB,* 386 U.S. 612, 620-23 (1967)) and, as this Court noted in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra,* 394 U.S. at 387: "It was widely assumed that, prior to 1947, the Norris-LaGuardia Act prevented federal courts from enjoining any 'secondary boycotts.'" In 1947 and again in 1959, Congress modified the permissibility of secondary activity under the National Labor Relations Act (*see,* 29 U.S.C. § 158(b)(4)), but as this Court made clear in the *Jacksonville Terminal* case, those modifications did not apply to a pure Railway Labor Act case, either directly or by implication 394 U.S. at 376 n.10, and at 392-93.

Here, however, the Circuit Judge in this case, and the other federal courts in their recent decisions granting injunctions against secondary picketing by petitioner, have concluded that the Norris-LaGuardia Act does not apply to secondary activity against a railroad because such picketing does not "involve or grow out of a labor dispute" within the meaning of Sections 4 and 13(a) of the Act. Petitioner BMWE respectfully submits that such a narrow reading of the Act requires immediate review by this Court because of its clear conflict with prior decisions by this Court and because of the conflict within the circuits themselves. *Compare, Smith's Management Corp. v. IBEW,* 737 F.2d 788, 791 (9th Cir. 1984), *with, Ashley, Drew & Northern Ry. v. UTU, supra,* 625 F.2d at 1364.

A further and, we submit, fundamental problem with both the "substantial alignment" and "economic self-interests" tests, and a clear justification for immediate review by this Court, is that those tests require the federal courts to examine the motives for union conduct which on its face is immunized by Sections 4 and 13(a) of the Norris-LaGuardia Act. Indeed, since neither test is provided for in the Act,[4] the courts are virtually free to apply their own notions of what is permissable economic activity in defining the limits the either test. However, Congress deliberately used broad language in the Norris-LaGuardia Act enumerating the specific types and the scope of union activities which were to be immunized, in order to prevent federal courts from inquiring into the union's motivation for engaging in that conduct. *United States v. Hutcheson, supra*, 312 U.S. at 236-37. As this Court has noted before, by enacting clear "mileposts for judges to follow" (75 Cong. Rec. 4935 (1932)(remarks of Sen. Bratton)), Congress intended to prevent "one of the greatest evils associated" with labor injunctions—*i.e.*, the use of legal doctrines "which often made the lawfulness of a strike depend upon judicial views of social and economic policy." *Jacksonville Bulk Terminals, Inc. v. ILA, supra*, 457 U.S. at 715. Both the "substantial alignment" and the "economic self-interest" tests, however, require the federal court to pass on the reasonableness of the union's secondary activity and, thus, both tests clearly "embroil federal judges in the very scrutiny of 'legitimate objectives' that Congress intended to prevent when it passed that Act." *Id.* at 719. As this Court observed in the *Jacksonville Bulk Terminals* case (457 U.S. at 719-20)(footnote omitted):

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[4] These standards are not provided by the Railway Labor Act or by any other federal legislation, for as explained *infra* at page 18, this Court has previously noted that the Railway Labor Act does not contain any standards which may be used to limit secondary activity. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra*, 394 U.S. at 391. Moreover, this Court also observed that: "The very complexity of the distinctions [between primary and secondary activity] . . ., if nothing else, plainly demonstrates that we lack the expertise and competence to undertake this task [*i.e.*, adopting the NLRA's principles on secondary activity to railway disputes] ourselves." *Id.* at 392. Surely, if the Supreme Court lacks the competence, so too do the lower federal courts.

> The applicability not only of § 4, but also of all of the procedural protections embodied in that Act, would turn on a single federal judge's perception of the motivation underlying the concerted activity. The Employer's interpretation [and we submit, both the *Ashley Drew* and *Atlantic Coast Line* tests, are] . . . simply inconsistent with the need, expressed by Congress when it enacted the Norris-LaGuardia Act, for clear "mileposts for judges to follow." . . .

This Court has made it clear many times before that the Norris-LaGuardia act's language is broad "because Congress was intent upon taking the federal courts out of the labor injunction business except in the very limited circumstances left open for federal jurisdiction under the Norris-LaGuardia Act [*e.g.*, § 7, 29 U.S.C. § 107]." *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365, 369 (1960). Moreover, this Court has emphasized before that the literal language of the Act is not to be ignored or construed narrowly because:

> There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted.

Order of Railroad Telegraphers v. Chicago & North Western R.R., 362 U.S. 330, 335 (1960).

Here, however, the lower federal courts, with but a few exceptions, have given the Act a narrow reading which ignores its literal terms and its intent, and have placed the courts back into the labor injunction business. Those rulings have occurred because those courts cannot accept the clear conclusion of the literal language that a striking labor organization in a rail labor dispute may not be enjoined from engaging in peaceful secondary picketing of neutral railroads. *See*, Appendix E at 2d, 3e-4e. That policy decision, petitioner BMWE submits, is for Congress, and not for the courts, to make. Congress has made its decision and it has immunized secondary activity in a pure Railway Labor Act dispute. *Accord, Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra.* Unfortunately, most lower federal courts have refused to accept that con-

clusion, and in view of both the clear conflict with prior decisions by this Court and the lack of uniformity among the lower courts in explaining why they can construe the Norris-LaGuardia Act narrowly, immediate review by this Court is warranted, and we submit urgently needed.

II. It is Important To The Entire Rail Industry And To The Effective Administration Of The Railway Labor Act That This Court Exercise Its Review And Supervisory Powers Over Lower Courts To Clarify Whether The Norris-LaGuardia Act Must Be Applied Literally And Broadly In A Case Involving Or Growing Out Of A Railway Labor Dispute

Beginning notably in 1978 with the strike of the Norfolk & Western Railway by the Brotherhood of Railway and Airline Clerks, rail carriers have begun to adopt the practice of the Florida East Coast Railway and have attempted to operate through strikes by using supervisory personnel and replacements. After a few weeks, traditional primary picketing is not effective against this form of carrier response, because once the carrier's supervisors and new work force clear out the initial backlog of cars, they can gradually expand their ability to handle the normal traffic flows. In order to make the strike activity sufficiently effective to convince the primary carrier that it is in its economic interest to exert every reasonable effort to resolve its dispute with the striking labor organization, it is necessary for the striking union to reduce the carrier's revenues by stopping or impeding sufficiently the flow of traffic into and out of the struck carrier's system. This can be accomplished only by picketing other railroads which provide traffic to, or which receive traffic from, the primary disputant. Such picketing, which asks the employees of those carriers to withhold their services from their employers in aid of the striking union, is clearly secondary activity, except in those cases where the secondary target has aligned itself with the primary disputant employer in some substantial manner. *E.g., National Woodwork Manufacturers Assoc. v. NLRB, supra,* 386 U.S. at 623; *NLRB v. Electrical Workers,* 228 F.2d 553, 557 (2d Cir. 1955), *cert. denied,* 351 U.S. 962 (1956).

In 1969, this Court examined an aspect of the validity of secondary picketing when it decided whether such picketing in a pure Railway Labor Act case was protected against state proscription by the Railway Labor Act. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra.* In answering that question, this Court noted that unlike the situation presented by Congress' actions in passing Section 8(b) (4) of the National Labor Relations Act, 29 U.S.C. § 158(b) (4), Congress has neither enacted for the railroad industry standards to judge when secondary activity is contrary to its rail labor policy, nor created an agency with even colorable authority to apply those non-existent standards. 394 U.S. at 391-92. Faced with those realities, this Court concluded in the *Jacksonville Terminal* case that the least unsatisfactory judicial solution was:

> [T]o allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law. Hence, until Congress acts, picketing—whether characterized as primary or secondary—must be deemed conduct protected against state proscription.

394 U.S. at 392-93 (footnote omitted).

Even though Congress has not acted since 1969 to ban all or even some secondary activity in a pure railway labor dispute, beginning in 1978 the lower federal courts, with but a few exceptions, have usurped Congress' prerogative by limiting improperly both the clear import of the *Jacksonville Terminal* case and the broad literal language of the Norris-LaGuardia Act to enjoin virtually all secondary picketing of railroads. *See, Ashley, Drew & Northern Ry. v. UTU, supra,* 625 F.2d at 1363-64 and cases cited therein. Indeed, some courts, because of a stringent application of their own concepts of permissible activity, have enjoined conduct which would be considered "primary" under the National Labor Relations Act. *See, Burlington Northern R.R. v. BMWE,* N.D. Ill. Nos. 86 C 2442,

et al., decided April 23, 1986, appeal pending, 7th Cir. No. 86-1666 (carrier which altered its operations after strike to move traffic for picketed carrier not aligned where picketed carrier, the D&H, was a secondary target not proven to be aligned with primary corporate affiliates, the MEC and PT.)[5]

By using their injunctive powers to limit the range of rail labor's economic activity to primary picketing, the federal courts have not only ignored the broad, literal language of the Norris-LaGuardia Act, but have also altered substantially the delicate balance struck by Congress between the uncontrolled power of management and rail labor to further their respective interests. That balance is crucial to the effectiveness of the Railway Labor Act in preventing interruptions to commerce because Congress relied upon collective bargaining to achieve that goal; collective bargaining, however, is not effective where one side knows that it can freely use the courts to block or to eliminate the other's economic self-help remedies. *See, Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra,* 394 U.S. at 392.

Petitioner BMWE respectfully submits that the validity of the carriers' use of the federal courts to prevent it from picketing neutral railroads is important not only to its ability to place sufficient economic pressure upon MEC and PT to bring them back to the bargaining table, but also to the entire rail industry. The validity of secondary-picketing injunctions has been a hotly contested question for years, and, if anything, the events of the past few weeks have only clouded this issue further, for the federal courts have not developed any consistent theory premised upon existing law to justify the injunctions which have been issued against petitioner. Moreover, the injunctions which are issued to protect other railroads act to prolong the strike and the harm which that activity creates for the affected shippers, public and rail employees.

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[5] Petitioner BMWE is preparing and will file in a few days a petition for a writ of certiorari to review the *Burlington Northern* cases before judgment by the Seventh Circuit. Petitioner is also preparing two other petitions to request writs of certiorari before judgment to review appeals in picketing cases pending before the District of Columbia and Second Circuits.

Federal courts are usually presented with injunction requests on extremely short notice, if such notice is even given, and are required to make immediately decisions which may make or break a strike without time for reflection or further study. This often means that the injunction decision is controlled by the economic and social predilections of the judge who, in most cases, is irrevocably against the disruptions to commerce which picketing almost invariably causes. Congress was fully aware of this when it enacted the Norris-LaGuardia Act and it chose to avoid this problem by enacting concrete "mileposts" for the courts to follow. *Jacksonville Bulk Terminals, Inc. v. ILA, supra,* 457 U.S. at 715-16. Unfortunately, many lower federal courts believe that due to their age, the Norris-LaGuardia Act's mileposts may be ignored or "accommodated" out of existence. Because of the wide variations which the lower courts have given to their reading of those mileposts, petitioner submits that only this Court can resolve this problem in time to make meaningful both petitioners right to engage in peaceful economic pressure and the commands of the Norris-LaGuardia Act.

This case, and its companion cases from the three other circuits to which petitioner is also seeking certiorari before judgment, present an excellent opportunity for this Court to resolve the questions presented by injunctions restraining secondary picketing in rail labor disputes. These issues are clearly ripe and are currently presented in live cases and controversies. However, unless resolved before the end of this term, those cases may be rendered moot because of simply the passage of time during which petitioner's economic power will have been improperly and irreparably limited by the courts. Moreover, as this Court's decisions to grant writs of certiorari in both the *Atlantic Coast Line* (384 U.S. 1000 (1966)) and *Jacksonville Terminal* (392 U.S. 904 (1968)) cases show, the issues presented by these cases warranted, and still warrant, review because the controversies which existed over the permissible and non-enjoinable economic activity arising out of the Florida East Coast Railway strike were important in 1966 and are still important and unresolved today.

CONCLUSION

For the reasons set forth above, petitioner BMWE respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review before judgment the appeal of respondent RF&P in *RF&P v. BMWE*, 4th Cir. No. 86-3544.

Respectfully submitted,

LOUIS P. MALONE, III
General Counsel
Brotherhood of Maintenance
of Way Employes
400 First Street, N.W.
Washington, D.C. 20001
(202) 638-2135

JOHN O'B. CLARKE, JR.
(Counsel of Record)
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Petitioner
Brotherhood of Maintenance
of Way Employes

Date: April, 1986

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

CIVIL ACTION NO. 86-352-A

RICHMOND, FREDERICKSBURG and
POTOMAC RAILROAD COMPANY,
Plaintiff,

v.

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES,
Defendant.

ORDER

[Filed April 4, 1986]

For the reasons stated from the bench, it appearing that the Railway Labor Act procedures for resolution of the underlying labor dispute have been unsuccessfully exhausted by the defendant; that the peaceful picketing by the defendant against the plaintiff, a neutral, arises out of a labor dispute; and pursuant to § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, this court lacks jurisdiction to award the injunctive relief requested by the plaintiff, it is hereby

ORDERED that the application of the plaintiff for a temporary restraining order and preliminary injunction is denied.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
April 4th, 1986

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

CIVIL ACTION NO. 86-0352-A

RICHMOND, FREDERICKSBURG & POTOMAC
RAILROAD COMPANY,

Plaintiff,

-vs-

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES,

Defendant.

Friday, April 4, 1986

Alexandria, Virginia

[Excerpts]

Transcript of Plaintiff's Application for Temporary Restraining Order in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

* * * *

[19]

THE COURT: It's broad [Norris-LaGuardia Act] but it's not overbroad. I think the definition itself is broad of a labor dispute and certainly what constitutes "growing out of a labor dispute" has been, as taught by Jacksonville Bulk Terminal

[*Jacksonville Bulk Terminals v. I.L.A.*, 457 U.S. 702 (1982)] an extremely broad concept. There is no doubt that, or it appears that they are picketing a neutral, but it's not completely disinterested in the underlying labor dispute in that it has an association and does some business with the MCRR [Maine Central Railroad Company] and PTRR [Portland Terminal Railroad Company], which do have the underlying labor dispute and which are of the same industry.

I think under this set of circumstances, the Norris-LaGuardia Act [29 U.S.C. § 101 *et seq.*] deprives this Court of jurisdiction to award the preliminary temporary restraining order sought by the plaintiff, and the request for it will be denied.

* * * *

[20]

THE COURT: What you have asked me for is a temporary restraining order. I find the Court lacks jurisdiction to entertain it. What you are wanting now is sort of a hybrid temporary restraining order, and I don't think I have got any more jurisdiction to direct that than I do the relief you sought in your application. The motion will be denied. I will prepare the order.

(Whereupon, the proceedings in the above-captioned matter were concluded.)

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

CIVIL ACTION NO. 86-352-A

RICHMOND, FREDERICKSBURG and
POTOMAC RAILROAD COMPANY,
Plaintiff,

v.

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES,
Defendant.

ORDER

[Filed April 10, 1986]

The court being of the opinion that this is a "case involving or growing out of any labor dispute" within the meaning of § 4 of the Norris-La Guardia Act, 29 U.S.C. § 104, even though the picketing is of a neutral in Richmond, Virginia, and there is no showing that such picketing will result in any economic impact on the defendant [*Cf. Jacksonville Bulk Terminals, Inc., et al.* v. *International Longshoremen's Association, et al.*, 457 U.S. 702 (1982)], and that therefore this court lacks jurisdiction to award the injunctive relief sought, it is hereby ORDERED that:

1. The application of the plaintiff for a temporary restraining order filed on April 10, 1986, is denied.

2. The application of the plaintiff for a preliminary injunction filed on April 10, 1986, is denied.

3. Plaintiff having indicated its intention to appeal from the foregoing rulings, the clerk is directed to transmit to the United States Court of Appeals for the Fourth Circuit the entire original record in this action.

/s/ ALBERT V. BRYAN, JR.

United States District Judge

Alexandria, Virginia
April 10th, 1986

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CIVIL ACTION NO. 86-0352-A

RICHMOND, FREDERICKSBURG & POTOMAC
RAILROAD COMPANY,
Plaintiff,

-vs-

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES,
Defendant.

Thursday, April 10, 1986

Alexandria, Virginia

[Excerpts]

Transcript of Plaintiff's Application for Temporary Restraining Order in the Above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

* * * *

[14]

THE COURT: I don't think it is. And if Western Maryland [*Western Maryland R.R. Co. v. System Board of*

Adjustment, 465 F.Supp. 963 (D.C. Md. 1979)] can survive Jacksonville Bulk Terminal [*Jacksonville Bulk Terminals v. I.L.A.*, 457 U.S. 702 (1982)], which I don't think it can, then it's controlling. But I think what Jacksonville Bulk Terminal teaches is that we should read the Norris-LaGuardia Act [29 U.S.C. § 101 et seq.] literally and broadly and when you do that you can't inquire into economic impact.

* * * *

[15]

THE COURT: I think that the Court is required now to read the Norris-LaGuardia Act literally and broadly in its definition of arising out of a labor dispute. I think this activity in Richmond arises out of a labor dispute. I think once that determination is made, the Court can go no further. It lacks jurisdiction to enter the temporary restraining order or preliminary injunction that the plaintiff seeks.

You are asking for both a preliminary injunction—I mean a preliminary injunction as well as a temporary restraining order.

I am perfectly willing to treat it as an application for preliminary injunction. Does the defendant have any problem with that?

[16]

MR. CLARKE [Counsel for BMWE]: No, Your Honor.

THE COURT: All right. Then I will—that will give you something you can appeal. You can't appeal I don't believe the denial of the TRO.

MR. FARRELL [Counsel for RF&P]: That is probably why I submitted it to you in motions. Your Honor, could we ask you to certify—29 USC 110 suggests that the Court should certify the record to the Court of Appeals.

Pardon me. 29 USC 110 suggests that the Court ought to certify. I don't think it's a discretionary thing. I think that—

THE COURT: (Interposing) Yes. I'll certify the record to the Court of Appeals but I will deny it for lack of jurisdiction, both the application for temporary restraining order and the application for a preliminary injunction.

MR. FARRELL: Thank you, Judge. Thank you for hearing us.

THE COURT: Yes, sir. I'll prepare the order.

Court will stand adjourned.

(Whereupon, at 3:17 o'clock p.m., Court was adjourned.)

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-3544

RICHMOND, FREDERICKSBURG and
POTOMAC RAILROAD COMPANY,
Appellant/Plaintiff

versus

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Appellee/Defendant

Appearances: Fred C. Alexander, Jr., Esquire
Clifford R. Oviatt, Esquire
Thomas F. Farrell, II, Esquire
for RF&P Railroad Company

John O. Clarke, Jr., Esquire
for Brotherhood & Maintenance
of Way Employes

ORDER

This motion for an injunction pending appeal is before me as a single judge on account of the requirements of time.

This dispute is a result of, second, third or fourth hand as one may consider the case, a labor dispute between the Brotherhood and the Maine & Central Railroad and the Portland Terminal Company, which may be referred to hereafter as Maine & Central. Maine & Central and the Brotherhood have reached an impasse in their dispute over recognized subjects of bargaining such as conditions of employment and rates of pay, and the emergency procedures under the

Railway Labor Act have not been invoked. Maine & Central is a subsidiary of the Guilford group, as is Delaware & Hudson Railroad. Maine & Central does not go south of New Hampshire and Vermont, but Delaware & Hudson runs into Alexandria, Virginia, where the yard is owned and operated by RF&P. The Union has not shown any substantial alignment between Maine & Central and Delaware & Hudson, not to say that the same might not be shown; however, it does not appear.

The Brotherhood has struck Maine & Central and is picketing the Alexandria yard of RF&P, advertising its dispute with Maine & Central. As a result, RF&P employees will not cross the picket line to work in that yard which serves not only Delaware & Hudson and RF&P but also several other railways, including Conrail, et al.

The Brotherhood has also picketed RF&P's yard in Richmond, advertising its dispute with Maine & Central, and RF&P employees there will not cross the picket line. The RF&P yard in Richmond serves neither Maine & Central nor Delaware & Hudson, although such cars pass through that yard going both north and south.

RF&P has had both a TRO and a preliminary injunction denied by the district court as it sought to stop the picketing at the Alexandria and Richmond yards of RF&P. RF&P is required by law to serve all railways which use its yards, and it is undenied that the picketing causes a considerable interference with interstate commerce, both at the Alexandria yard and at the Richmond yard. I take it as a given that such an interference may be enjoined.

The Brotherhood takes the position that its picketing, which is peaceful, may not be enjoined under the Norris Laguardia Act, see 29 U.S.C. § 104, et seq, because it is involved in the labor dispute with Maine & Central and it thus has a right to advertise that dispute by picketing anywhere within the railroad industry, whether or not the site of the picketing has any connection with Maine & Central. It bases its case on *Jacksonville Bulk Terminals v. Longshoremen,* 457 U.S. 702 (1982). In the *Jacksonville* case, the Court held, in a dispute between an employer and its union under the terms of a collective bargaining agreement, that an injunction might not

issue because of the Norris LaGuardia Act when the dispute between the employer and the union was not an arbitrable dispute. Since there was in fact a dispute, the Court held that courts should not inquire into the motive behind the dispute which in that case was shipping goods to Russia which had recently taken over Afghanistan.

I do not read *Jacksonville* as broadly as does the Brotherhood. There is no labor dispute here between RF&P and the Brotherhood. Therefore, I think it doubtful that the Norris LaGuardia Act forbids an injunction to issue in this case merely because the Brotherhood is in a dispute with Maine & Central. The Brotherhood is not in a dispute with RF&P. I should add that neither is the Brotherhood in a dispute with Delaware & Hudson, it having a separate collective bargaining agreement from the one in controversy.

A case which is nearer to the holding sought by the Brotherhood is *Railroad Trainmen v. Terminal Company,* 394 U.S. 369 (1969). In that case, the Court held an injunction should not issue under state law against picketing a terminal jointly owned by a railroad which made 30% of the interchanges at the terminal, among other uses, and was in a labor dispute with the union involved. The Court held that state law was preempted and that the Railway Labor Act left open whatever peaceful economic power the union had so long as its use conflicted "with no other obligation imposed by federal law," 394 U.S. at 392. So, if there were no other obligation imposed by federal law, the injunction in this case might not issue. But it seems to me that the interference with interstate commerce is a sufficient other obligation imposed by federal law that has been violated in this case; at least it appears that way to me now on the papers at hand and upon argument of counsel.

In deciding whether or not to issue an injunction pending appeal, I take into account that the harm done the plaintiff is irreparable in its loss of revenues. I think the plaintiff is more than likely to succeed on appeal. I am cognizant of the fact that the strike may be prolonged by the Brotherhood's inability to picket entire strangers to the controversy, but I do not think the

law supposes that the Brotherhood, as it candidly claims, may picket any railway installation anywhere in the United States on account of a dispute which, in its broadest terms, is in Maine, New Hampshire and Vermont.

I am thus of opinion an injunction pending appeal should issue. I should say that my decision is supported by *Ashley, Drew & No. Ry. v. UTU,* 625 F.2d 1357 (8th Cir. 1980), and *Western Md. RR Co. v. System Bd.,* 465 F.Supp 963 (D. Md. 1979), and may well be contrary to *Smith Management Corp. v. IBEW,* 737 F.2d 788 (9th Cir. 1984).

For the foregoing reasons, it is accordingly ADJUDGED and ORDERED as follows:

I

The Brotherhood shall withdraw its pickets from the Alexandria and Richmond yards of the RF&P Railway during the pendency of this appeal or until further order of the court.

II

This appeal is expedited to be heard at the May term of this court.

III

While the terms of this order are in effect immediately, as a condition for its continuance beyond April 18, 1986, the plaintiff or someone for it shall enter into bond, conditioned as the law directs, in the sum of $100,000 to be filed with the clerk of this court.

The attorneys objected to every adverse ruling in this order for all of the reasons which would be supported by the record.

Enter this 12th day of April 1986.

/s/ H. Emory Widener, Jr.

United States Circuit Judge

APPENDIX F

Statutes Relied Upon:

NORRIS-LAGUARDIA ACT, 29 U.S.C. § 101, *et seq.*

A. Section 4, 29 U.S.C. § 104:

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

B. Section 13, 29 U.S.C. § 113:

§ 113. Definitions—Labor dispute—Participants—Courts included

When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation, or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employees or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

APPENDIX G

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES

C. A. 86-951

v.

ASSOCIATION OF AMERICAN RAILROADS

and

ALTON & SOUTHERN RAILROAD COMPANY

C. A. 86-977

v.

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES

Washington, D.C.

April 10, 1986

The above-entitled matter came on for Temporary Restraining Order before the Honorable Harold Greene, United States District Court Judge, at approximately 12:01 A.M., in courtroom number one.

* * * *

PROCEEDINGS

(Excerpt of the proceedings at 12:01 A.M.)

THE COURT: It's 12:01. The Union's request for a Temporary Restraining Order against the railroads seeking the

relief in other courts is dismissed, number one, because apparently it's been withdrawn, and secondly, because the court doesn't have any such authority anyway.

Insofar as the request by the railroads for a Temporary Restraining Order is concerned it depends on reconciliation of the Norris-LaGuardia Act with the Railway Labor Act. It is clear that labor dispute exists between these parties.

It is also my opinion that it is a "Major Dispute", and that to require the railroads to cease doing business with the New England counterparts would qualify as a major dispute, particularly where the dispute in New England itself is a major one.

It may be a violation of the Railway Labor Act to fail to utilize the machinery of that act, particularly that of the mediation board to resolve the dispute.

The court is also mindful that among the general purposes of the act is the avoidance of interruption of interstate commerce in a major way.

The court is not ready finally to resolve these questions because it is of the view that at this juncture the issuance of an injunction would be premature in light of the Norris-LaGuardia Act.

As the different results in the various district courts which have passed on this issue demonstrates, the question whether a tribunal may issue an injunction in this kind of railway dispute notwithstanding the Norris-LaGuardia Act is a difficult one. Furthermore, the Supreme Court has given different and rather cryptic signals on this issue.

On the one hand, the Norris-LaGuardia Act is said not to deprive the courts of the power to enforce compliance with the "various mandates of the Railway Labor Act". On the other hand, the lower courts are told that they should hesitate to fix upon the injunctive remedy unless that remedy alone can effectively guard the plaintiff's right to effective use of the act's machinery.

The prime objective, which the court is concerned with at this point, is the protection of the commerce of the United States from interruption. It is not established in my opinion that there will be such an injury to that commerce that the Norris-LaGuardia Act mandate should be disregarded.

Picketing in the three cities which are involved at this point may or may not result in significant disruption. Picket lines may or may not be fully honored. Supervisory personnel and replacement hires may keep the trains running. There may even be an agreement between the parties to resolve this dispute before an injunction may have to be issued, and there may be other circumstances, which one could speculate on, which would avoid a disruption.

Furthermore, it may be that the President will utilize section ten of the act to appoint an emergency board so as to freeze the status quo for 60 days.

If anything is clear from the law as laid down by the Supreme Court and the appellate courts it is that a court should be cautious in issuing an injunction in a labor dispute, including one in a railway labor dispute, and should not do so unless it is clearly necessary.

For these reasons, the court will deny the TRO at this time. However, this decision is without prejudice to renewed application by the railroads in the event that, one, interstate commerce is threatened in a more significant fashion than it is today, and, two, other remedies have finally proved to be unavailable.

Court will be in recess.

(The above-entitled matter was concluded.)

Supreme Court, U.S.
FILED
MAY 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Petitioner,

v.

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit Before Judgment

BRIEF IN OPPOSITION

Of Counsel:

URCHIE B. ELLIS, Esquire
Vice-President, Law
Richmond, Fredericksburg & Potomac Railroad Company
2134 West Laburnum Avenue
Post Office Box 11281
Richmond, Virginia 23230
(804) 257-3235

JOHN S. STUMP
(*Counsel of Record*)

FRED C. ALEXANDER, JR.
THOMAS F. FARRELL, II
CLIFFORD R. OVIATT, JR.
BOOTHE, PRICHARD & DUDLEY
1199 North Fairfax Street
Post Office Box 1101
Alexandria, Virginia 22313
(703) 549-5900

Attorneys for Respondent
Richmond, Fredericksburg & Potomac Railroad Company

Date: May 13, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether a rail labor union, engaged in a dispute with a small, geographically isolated rail carrier, may lawfully employ secondary picketing at the facilities of all other carriers across the nation with which it has no dispute, thereby effectively halting interstate rail traffic, in an effort to bring pressure to bear on the struck railroad.

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CASES RELIED UPON:

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Railway Labor Act, 45 U.S.C. § 151, *et seq.* 4

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IN THE

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OCTOBER TERM, 1985

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Petitioner,

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RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit Before Judgment

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BRIEF IN OPPOSITION

The Brotherhood of Maintenance of Way Employes [hereinafter, "BMWE"], has asked this Court to grant expedited consideration and argument on Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth and Seventh Circuits Before Judgment. Richmond, Fredericksburg & Potomac

Railroad Company[1] [hereinafter, "RF&P"] is the respondent to the Petition filed in Record No. 85-1792. That case is presently pending before the United States Court of Appeals for the Fourth Circuit.

The controversy between the BMWE and RF&P arises out of picketing of RF&P's railyard facilities in Alexandria, Virginia and Richmond, Virginia by Maine Central Railroad employees who are members of the BMWE. RF&P has no dispute of any kind with the BMWE or any of its members. The BMWE is presently striking the Maine Central Railroad and the Portland Terminal Company [hereinafter, "MEC" and "PT"], and has been since early March, 1986. There is no connection of any kind between RF&P and MEC or PT. Indeed, the United States District Court for the Eastern District of Virginia, by the Honorable Albert V. Bryan, Jr., found that the RF&P was a "neutral" in the dispute between BMWE and the MEC and PT.

Despite the fact that the RF&P has provided no assistance to the MEC and PT in the dispute since the institution of the strike by BMWE, that union sent picketers to the Alexandria facilities on April 4, 1986, and to the Richmond facilities on April 9, 1986. RF&P unsuccessfully sought injunctions from the District Court to prohibit that picketing.

On April 11, 1986, RF&P filed a Motion for Injunction Pending Appeal pursuant to FED.R.APP.P.

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[1] RF&P is controlled by CSX Corporation through its ownership of the Chesapeake & Ohio Railroad, the Baltimore & Ohio Railroad and Seaboard Railroads which together control Richmond - Washington Company which in turn owns 60% of the voting stock in RF&P.

8. Since the Court of Appeals was in recess, RF&P was granted a hearing before a single circuit judge, the Honorable H. Emory Widener, Jr., who heard the matter in chambers in Abingdon, Virginia on April 12, 1986. At that time Judge Widener issued an Order granting the injunction sought by the RF&P. The Motion for Expedited Appeal was also granted. Agrument on the merits of the appeal was heard before a three-judge panel of the Court of Appeals on May 5, 1986.

Subsequent to that hearing, and on that date, by a vote of 2 to 1, Judge Widener dissenting, the panel dissolved the injunction pending appeal Judge Widener had entered on April 12. As yet, the panel has issued no decision on the merits of the controversy.

On May 7, 1986, RF&P filed a Suggestion for a Rehearing in Banc. (Copy attached as Attachment A). On May 9, 1986, RF&P filed Appellant's Motion to Reinstate Injunction Pending Appeal. (Copy attached as Attachment B). It is expected that the Court of Appeals will rule upon these motions during the week of May 12, 1986.

Subsequent to the dissolution of the injunction, on May 8, the BMWE posted pickets at the Alexandria and Richmond facilities. As a result, all but a few of RF&P's union employees, approximately 350 in Alexandria and approximately 300 in Richmond, have refused to cross the picket lines, resulting in a severe disruption of RF&P's ability to service north-south traffic along the eastern seaboard. RF&P is a major "bridge-carrier," and is the primary link between the Northeast and the South of the United States. At its Alexandria facilities, the RF&P serves Conrail, Baltimore & Ohio Railroad, Chesapeake & Ohio Railroad,

Southern Railway Company and Delaware & Hudson Railroad.

As a result of the work stoppage, RF&P is unable fully to meet its obligations to provide "safe and adequate" transportation service "on reasonable requests" as required by the Interstate Commerce Act, 49 U.S.C § 10101(a). As time passes, RF&P's ability to meet its obligations will become more difficult, resulting in a loss of business, some of which has already occurred. Under these circumstances, a carrier may be liable to a third party in a federal damage action for the breach of this duty even when it is beset by labor controversies. *Brotherhood of Railway Clerks v. Florida East Coast Railway*, 384 U.S. 238, 245 (1966). Both the Seventh and Eighth Circuit Courts of Appeal have recognized that the duties imposed by the Interstate Commerce Act create a corresponding federal right to relief from unprivileged interference with the carrier's performance of these rights. *Ashley, Drew & Northern Ry. v. United Transportation Union*, 625 F.2d 1357 (1980); *Toledo, P. & W. Railroad v. Brotherhood of Railroad Trainmen*, 132 F.2d 265 (7th Cir. 1942), *rev'd on other grounds*, 321 U.S. 50 (1944). The actions by the BMWE also violate the clear mandate of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, which has as one of its primary purposes, the prevention of "interruption to commerce".

BMWE takes the position that because it has a local dispute with a Maine railroad that it may picket any railroad in the United States, relying on *Jacksonville Bulk Terminals, Inc. v. ILA*, 457 U.S. 702 (1982). This argument is contrary to twenty years of jurisprudence accommodating the Norris-LaGuardia Act,

29 U.S.C. § 101 *et seq.*, to the Railway Labor Act and the Interstate Commerce Act. All the reported decisions of the various courts of appeal have adopted or applied the "substantial alignment" test, which requires that a railroad aid or "align" itself with the struck railroad before the union may picket without fear of injunction. *See, e.g., Ashley, Drew & Northern Ry. v. UTU, supra; Brotherhood of Railway Trainmen v. Atlantic Coastline R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1960). *Jacksonville Bulk*, upon which BMWE relies, did not address the issue of secondary picketing, nor did it involve the mandates of the Railway Labor Act and the Interstate Commerce Act. The case dealt only with the motivation for a dispute—not whether a dispute exists at all.

It is RF&P's position that this matter should be disposed of first by the Court of Appeals in banc. If the Court of Appeals fails to grant RF&P's suggestion, or alternatively fails to grant it an injunction pending appeal to this Court, RF&P would concur with the BMWE's Motion for Expedited Consideration. It cannot be disputed that the issues presented by this controversy are of national importance. Railroads across the United States have been affected by BMWE's position that it is entitled to picket any railroad in the United States if it has a local dispute somewhere. Railroads affected to date include RF&P, Burlington Northern Railroad Company, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Atchison, Topeka & Sante Fe Railway Company, Baltimore & Ohio Railroad Company, Baltimore & Ohio Chicago Terminal Railroad Company, Chesapeake & Ohio Railway Company, Seaboard System

Railroad, Inc., Norfolk & Western Railway, Southern Railway, Delaware & Hudson Railway, Boston & Maine Railroad Company, as well as the struck railroads, the MEC and PT. All of the railroads that have been found neutral, other than RF&P, so far have been protected by injunction.

BMWE seeks to reverse twenty years of decisions and impose a severe and unwarranted hardship on the railroad industry. Undoubtedly, this Court should ultimately resolve these issues. RF&P believes that they first should be considered and determined by the Court of Appeals in banc.

Respectfully submitted,

JOHN S. STUMP
(Counsel of Record)
FRED C. ALEXANDER, JR.
THOMAS F. FARRELL, II
CLIFFORD R. OVIATT, JR.
BOOTHE, PRICHARD & DUDLEY
1199 North Fairfax Street
Post Office Box 1101
Alexandria, Virginia 22313
(703) 549-5900

Attorneys for Respondent
Richmond, Fredericksburg &
Potomac Railroad Company

URCHIE B. ELLIS, Esquire
Vice-President, Law
Richmond, Fredericksburg &
Potomac Railroad Company
2134 West Laburnum Avenue
Post Office Box 22181
Richmond, Virginia 23230
(804) 257-3235

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ATTACHMENT A

***Richmond, Fredericksburg & Potomac Railroad Company v. Brotherhood of Maintenance of Way Employes*, C.A. No. 86-3544, United States Court of Appeals for the Fourth Circuit, Appellant's Suggestion for Rehearing in Banc**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 86-3544

RICHMOND, FREDERICKSBURG,
& POTOMAC RAILROAD COMPANY,

Appellant,

v.

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES,

Appellee.

SUGGESTION FOR REHEARING IN BANC

PRELIMINARY STATEMENT

Richmond, Fredericksburg & Potomac Railroad Company (RF&P), by counsel, pursuant to FED.R.APP.P. 27 and 35(a)(2), hereby suggests that the Court of Appeals for the Fourth Circuit rehear in banc argument relating to the Motion for Dissolution of Injunction Pending Appeal filed by the Brotherhood of Maintenance of Way Employes (BMWE).

On April 12, 1986, the Honorable H. Emory Widener, Jr., sitting as a single judge because of an emergency in the railroad industry issued an injunction pending appeal (copy attached) prohibiting the BMWE from picketing or otherwise interfering with the operations of the RF&P at its facilities in Potomac Yard, Alexandria and its Richmond facilities pending the appeal of denial of motions for preliminary injunctions on April 4 and 10, 1986 by the United States District Court for the Eastern District of Virginia, Alexandria Division (by the Honorable Albert V. Bryan, Jr.)

On May 5, 1986, after argument on the merits of the appeal and upon the Motion for Dissolution of Injunction Pending Appeal, in a two to one decision, Judges Hall and Murnaghan with Judge Widener dissenting, ordered the dissolution of the injunction entered by Judge Widener on April 12. Because this proceeding involves a question of exceptional national importance, RF&P asks that the court rehear in banc the Motion for Dissolution of Injunction Pending Appeal.

RF&P notes that an appellee railroad in a nearly identical case pending before this Court has filed a Motion for Expedited In Banc Hearing, in *Norfolk and Western Railway Co. v. Brotherhood of Maintenance of Way Employes,* Record No. 86-3555.

ARGUMENT AND AUTHORITIES

I. THE PANEL DECISION IS CONTRARY TO ALL REPORTED AUTHORITY AND WILL RESULT IN A SERIOUS AND IRREPARABLE INJURY TO RF&P AND OTHER INNOCENT PARTIES

A. RF&P And Other Neutral Parties Will Be Irreparably Harmed If Picketing Is Permitted.

The split decision by the panel has necessarily resulted in a ruling on the merits of the appeal. *Cf. Bailey v. Willeford,* 131 F. 242 (4th Cir. 1904). By dissolving the injunction issued by Judge Widener, the panel is permitting the picketing to recommence necessarily resulting in a severe curtailment of RF&P's ability to serve interstate commerce, and placing RF&P in jeopardy of violating its responsibilities to other rail carriers under the Interstate Commerce Act, 49 U.S.C. § 11101 (1978).

While the panel has issued no ruling on the merits of the case, the position taken by the BMWE in its papers and upon oral argument was that the federal judiciary is deprived of jurisdiction to issue an injunction in this dis-

pute by the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (1932, as amended). Apparently having adopted this reasoning, the effect of the panel decision is to permit the BMWE or any other union engaged in a purely local dispute with a local railroad to picket railroads throughout the entire United States without restraint.

The prejudicial consequences of this result can be no where more clearly seen than through the impact upon the RF&P. BMWE is engaged in a labor dispute with the Maine Central Railroad and Portland Terminal Company in the state of Maine. Maine Central connects in New England with the Boston & Maine Railroad. The Boston & Maine in turn connects with the Delaware and Hudson Railroad which has trackage rights into Potomac Yard in Alexandria. Thus, RF&P has no relationship of any kind and provides no services for the primary roads in Maine.

As a result of the picketing that occurred until Judge Widener issued the injunction of April 12, RF&P estimated that it had a daily revenue loss in excess of $117,000. RF&P employees refused to cross the picket line. The picketing also caused irreparable harm to Potomac Yard and RF&P's plant, rolling stock and maintenance programs. Potomac Yard is currently engaged in a $7,800,000 construction project to modernize and reconfigure its freight car classification facilities and a $1,000,000 computerization project. Every day of delay in the completion of those projects between now and the anticipated completion date results in substantially increased project costs. For every day of picketing, the project is set back by approximately 3 days. (Jt. App. at 38).

The picketing at Potomac Yard will cause RF&P employees, who have no dispute of any kind with RF&P, to lose $1,600,000 per month in wages. Moreover, RF&P will not be able to provide service to companies relying upon it for shipping between its facilities in Richmond and Alexandria. On the other hand, BMWE has never presented

any facts upon which a court could find that it would be harmed if an injunction is effective pending appeal.

B. The Panel Decision Is Contrary To Twenty Years Of Uniform Decisions And Conflicts With Decisions Of Other Circuits.

The split decision of the panel is unprecedented in labor law jurisprudence and particularly in the transportation industry. For generations the railroad industry has been governed by a *sui generis* labor law, culminating in 1932 in the Railway Labor Act, 45 U.S.C. § 151 *et seq.* BMWE has taken the position that while secondary picketing is outlawed and enjoinable through the auspices of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), such a provision was not included in the Railway Labor Act and thus the picketing here is "not regulated" and thus cannot be enjoined. That position has not been the law for more than forty years. During the debates resulting in the Taft-Hartley Act amendments to the NLRA which outlawed secondary picketing, Senator Taft specifically stated that a provision outlawing secondary boycotting was not needed in the Railway Labor Act because that Act had always had its own procedures and there had been "no abuses which had arisen in connection with the operation of the Railway Labor Act". 93 Cong. Rec. 6498, 2 Legislative History of the Labor Management Relations Act, 1947, p. 1571. *See discussion* in *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 376, n. 10 (1969).

Facing the issues presented by this appeal, the courts have for 20 years held secondary picketing of neutral railroads unlawful and enjoinable despite the prohibitions of the Norris-LaGuardia Act. It is only when a railroad has substantially aligned itself with the primary employer that a union may extend its picketing to the secondary railroad. This test was first adopted by the Court of Appeals for the Fifth Circuit in *Brotherhood of Railroad Trainmen v.*

Atlantic Coastline Railroad Co., 362 F.2d 649 (5th Cir.), *aff'd. by an equally divided court*, 385 U.S. 20 (1966). Three years later the Supreme Court decided *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co., supra*, at p. 4. While the primary holding in that case was that state law was preempted, the Court went to great lengths to find that the Jacksonville Terminal was an "integral part of the day-to-day operations" of one of the owners of the terminal, Florida East Coast Railroad, the primary employer subject to the strike.

Since the *Jacksonville Terminal* and *Atlantic Coast Line* decisions, the reported cases have unanimously held that a neutral railroad cannot be picketed absent the showing of substantial alignment. *See Ashley, Drew & Northern Ry. Co. v. United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980); *Western Maryland RR Co. v. System Board*, 465 F. Supp. 963 (D. Md. 1979); *Southern Railway Co. V. BRAC*, 99 LRRM 2608 (W.D. NY 1978), *Terminal Railroad of St. Louis v. BRAC*, 458 F. Supp. 100 (E.D. Mo. 1978). There is no reported decision of any court that supports the position taken by the BMWE in this case. The 2 to 1 decision by the panel here is directly contrary to the decisions of the Fifth and Eighth Circuits in *Atlantic Coastline, supra* and *Ashley Drew, Supra.*, and, to the knowledge of counsel this inconsistency was not explained by the panel in its decision to dissolve the injunction pending appeal.

Several lower court decisions arising out of the same illegal activity taken by the BMWE against RF&P here have demonstrated the continuing vitality of the substantial alignment doctrine. *See e.g. Burlington Northern v. BMWE*, No. 86-C-442 (N.D.Ill. April 24, 1986); *Consolidated Rail Corp. v. BMWE*, No. 86-0318T (W.D.N.Y. April 6, 1986); *Norfolk & Western Railway Co., et al. v. BMWE*, No. 86-0191-R (W.D.Va. April 22, 1986). The decision issued by the Honorable Harold H. Greene of the United States District Court for the District of Columbia is not

to the contrary. In that decision, Judge Greene specifically found alignment between the complaining railroad and the struck railroads in Maine. *See Central Vermont Railway, Inc. v. BMWE*, No. 86-0951 (D.C.C., April 25, 1986, at p. 7, n.7 and p. 17, n.17).

C. Jacksonville Bulk Did Not Overrule Twenty Years of Uniform Precedent.

While the split panel here has yet to issue its decision on the merits, BMWE has argued that the decision of the Supreme Court in *Jacksonville Bulk Terminals v. Longshoreman*, 455 U.S. 702 (1982), obliterated the twenty-year old requirement for substantial alignment in the railroad industry. The Supreme Court did not have the issue of secondary picketing before it in that case and never addressed it; nor did it address the twenty years of history in the railroad industry requiring substantial alignment. The only holding in that decision is that a politically motivated strike cannot be enjoined under the auspices of the Norris-LaGuardia Act.[1]

D. Federal Courts Have Jurisdiction to Enjoin This Conduct.

Lastly, it is possible that the panel, rather than relying on the proscriptions of Norris-LaGuardia, found that a federal court lacked jurisdiction to issue an injunction in the first instance. If that is the basis of the decision, it is in direct conflict with decisions of the Fifth, Seventh and Eighth Circuit Courts of Appeal. A district court as well as this court plainly has jurisdiction to issue an injunction under the Interstate Commerce Act, *supra*, *see Toledo P&W.R. v. Brotherhood of R.R. Trainmen*, 132 F.2d 265 (7th Cir. 1942), *rev'd on other grounds, 321 U.S. 50 (1944);*

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[1] Similarly, *Smith Management Corp. v. IBEW*, 737 F.2d 788 (9th Cir. 1984), involved a non-railroad industry employer. Moreover, there, the picketed employer was a direct beneficiary of the work involved in the primary labor dispute and was not three or four times removed from it as RF&P is in Alexandria and Richmond.

Ashley, Drew, supra; *Atlantic Coastline Railroad, supra.*, or under the Railway Labor Act. *See Burlington Northern v. BMWE, supra* at 6.

CONCLUSION

The 2 to 1 decision dissolving the injunction issued by Judge Widener will have an immediate impact upon the commerce of the United States because it will result in a severe curtailment of the operations of the RF&P, a major bridge carrier from north to south. Potomac Yard serves six railroads including Conrail and the Southern Railway Company, two of the nation's major rail carriers. Their operations similarly will be substantially and deleteriously affected. The issue involved is one of exceptional importance not only to the RF&P, but to the railroad industry and the nation. Indeed, BMWE itself has stated that these issues are "crucial" to it and to the "rail industry". *See* Petition for a Writ of Certiorari Prior to Judgment, filed by the BMWE on May 1, 1986.

For the reasons stated, RF&P asks this Court in banc to rehear this matter as expeditiously as possible. Alternatively, RF&P requests that this Court stay the decision of the panel dissolving the injunction pending review by the Supreme Court of the United States.

RICHMOND, FREDERICKSBURG &
POTOMAC RAILROAD COMPANY

BY COUNSEL

BOOTHE, PRICHARD & DUDLEY
1199 North Fairfax Street
Post Office Box 1101
Alexandria, Virginia 22313
(703) 549-5900

By /s/FRED C. ALEXANDER, JR.

ATTACHMENT B

Richmond, Fredericksburg & Potomac Railroad Company v. Brotherhood of Maintenance of Way Employes, C.A. No. 86-3544, United States Court of Appeals for the Fourth Circuit, Appellant's Motion to Reinstate Injunction Pending Appeal

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RECORD NO. 86-3544

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY,

Appellant,

v.

BROTHERHOOD OF MAINTENACE OF WAY EMPLOYES,

Appellee.

APPELLANT'S MOTION TO REINSTATE INJUNCTION PENDING APPEAL

TO: The Honorable H. Emory Widener, Jr., Circuit Judge
The Honorable Kenneth K. Hall, Circuit Judge
The Honorable Francis D. Murnaghan, Jr., Circuit Judge

Appellant Richmond, Fredericksburg & Potomac Railroad Company (RF&P), by counsel, moves the Court to reinstate the injunction pending appeal heretofore granted by Judge Widener on April 12, 1986, and dissolved by order of the panel on May 5, 1986, and in support thereof states as follows:

1. Eleven of the largest railroads in the country now enjoy preliminary injunctive protection from picketing by members of BMWE on strike against the Maine Central Railroad.[1] As a result, the RF&P is the only non-Guilford

[1] These railroads are Norfolk and Western Railroad Company, Southern Railway Company, Consolidated Rail Corporation, Burlington Northern Railroad Company, Union Pacific Railroad Company, Missouri Pacific Railroad Company, The Atchison, To-

System railroad in the country now being picketed by BMWE (except for the Central Vermont railroad which directly serves the strike-bound railroad as found the United States District Court for the District of Columbia in *Central Vermont Railway, Inc. v. BMWE*, CA No. 86-1141, at footnotes 7 and 17).

2. In a well-reasoned decision, which survived two reviews by the Supreme Court, the Seventh Circuit specifically held that the Norris-LaGuardia Act does not prohibit the granting of an injunction to maintain the status quo pending resolution of the jurisdictional issues presented by the appeal. *Chicago & N.W.R. Co. v. United Transportation Union*, 422 F.2d 979, 982-85 (7th Cir. 1970), *rev'd on other grounds*, 402 U.S. 570 (1971), *on remand*, 336 F. Supp. 1149 (1971), *rev'd on other grounds*, 471 F.2d 366, 367-68 (7th Cir. 1972), *cert. denied*, 410 U.S. 917 (1973).

> . . .In the absence of a specific Congressional directive, we strike the balance in favor of maintaining the status quo to allow time for a meaningful judicial review.

422 F.2d at 985. That court also relied in part on a concurring opinion of Justice Frankfurther in *United States v. United Mine Workers*, 330 U.S. 258 (1947):

> To suggest that the right to determine so complicated and novel an issue could not be brought within the cognizance of the district court, *and eventually of this Court*, is to deny the place of the judiciary in our scheme of government. 330 U.S. at 310. (Emphasis supplied)

422 F.2d at 985.

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peka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, The Chesapeake and Ohio Railway Company, and Seaboard System Railroad, Inc.

3. The panel should be aware that Justice Marshall last week denied BMWE's motion to dissolve the preliminary injunction issued by the United States District Court for the Western District of New York in *Conrail v. BMWE*, following the denial of a similar motion to the Second Circuit on April 22, 1986, 2d Cir. No. 86-7289.

4. In the present posture of the case, RF&P is being picketed at all of its facilities to its irreperable harm should the jurisdictional issue be decided adversely to the appellee BMWE by the panel, by the Court in banc, or by the Supreme Court. The union is adequately protected by the surety bond posted by RF&P in this Court. Fundamental fairness requires that RF&P be afforded the same "status quo" protection pending appeal as that granted to all of the similarly situated railroads throughout the country.

May 9, 1986

Richmond, Fredericksburg
& Potomac Railroad Company

By Counsel

BOOTHE, PRICHARD & DUDLEY
1199 North Fairfax Street
Post Office Box 1101
Alexandria, Virginia 22313
(703)549-5900

By /s/FRED C. ALEXANDER
Fred C. Alexander, Jr.
Counsel for Appellant